(5)

No. 91-1657

In The
Supreme Court of the United States
October Term, 1991

Charlene Leatherman, et al.
Petitioners,

vs.

Tarrant County Narcotics Intelligence
and Coordination Unit, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

City of Lake Worth, Texas' Brief in Opposition

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. May a complaint against a local governmental entity brought under 42 U.S.C. section 1983 be dismissed for failure to plead specific factual allegations supporting governmental liability?

a. Whether dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure of an action brought pursuant to 42 U.S.C. section 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. section 2072(b)?

b. Whether a compliant will withstand a motion to dismiss brought pursuant to Rule 12(b)(6), even though it contains only conclusory allegations that track the requirements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?

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JURSIDICTIONAL STATEMENT

This respondent does not challenge the statutory provision on which Petitioners rely for jurisdiction, nor is the timeliness of the petition questioned.

STATUTES AND RULES INVOLVED

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain *** (2) a short and plain statement of the claim showing that the pleader is entitled to relief, ***
>
> **(e) Pleading to be Concise and Direct: Consistency.**
>
> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.
>
> **(f) Construction of Pleadings.**
>
> All pleadings shall be so construed as to do substantial justice.

The Rules Enabling Act, Title 28, United States Code, Section 2072 provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United Sates district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. ***

LIST OF PARTIES

PETITIONERS

Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman; Gerald Andert; Kevin Lealos and Jerri Lealos, individually and as next friend of Travor Leaslos and Shane Lealos, Pat Lealos, and Donald Andert.

RESPONDENTS

The Tarrant County Narcotics Intelligence and Coordination Unit; Tarrant County, Texas; Tim Curry, in his official capacity, and Don Carpenter, in his official capacity; City of Lake Worth, Texas; and City of Grapevine, Texas.

STATEMENT OF THE CASE

Petitioners Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman (collectively referred to as the "Leatherman" plaintiffs, alleged, in their complaint, inter alia, that Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"), Tarrant County, Texas ("Tarrant County") and the City of Lake Worth, Texas (the "Lake Worth") violated their constitutional rights in connection with Respondents' search of their residence. The allegations against these three Respondents stem from the shooting of Petitioners' dogs during the search.

The District Court initially considered a motion filed by TCNICU pursuant to Rule 12(b)(6) to dismiss the original complaint. The District Court, the Honorable David Balew presiding, dismissed the complaint for failure to state a claim, but later vacated the dismissal and provided the Leatherman plaintiffs with additional time to amend to cure the inadequacies. The basis of this dismissal was that the Leatherman plaintiffs had failed to allege any facts to support the existence of a policy or custom which would overcome the defendant governmental entities' absolute immunity, and subject

them to liability. In its opinion, the District Court specifically directed the plaintiffs' attention to the Fifth Circuit's heightened pleading requirement for 1983 cases.

In order to attempt to cure the deficiencies in the complaint, the Leatherman plaintiffs added Gerald Andert, Kevin Andert, Kevin Lealos and Jerri Lealos, individually and as next friends of Travor and Shane Lealos, Pat Lealos, and Donald Andert (collectively the "Andert plaintiffs"), and new defendants, Tim Curry and Don Carpenter, in their official capacities as Director of the TCNICU and Sheriff of Tarrant County, respectively, and the City of Grapevine ("Grapevine"). Petitioners added the Andert incident in an apparant attempt to show that the Leatherman search was not an isolated incident, and establish the existence of a governmental policy.

TCNICU, Curry, Carpenter and Grapevine moved to dismiss, again pursuant to Rule 12(b)(6), and the District Court, the Honorable John McBryde now presiding, again dismissed the Petitioners' complaint as to all the defendants. The District Court noted that Petitioners still had pleaded the existence of a custom or policy only in the most conclusory terms, and did not

inform the Respondents as to what training policy the Respondents had allegedly failed to implement. Nor did Petitioners provide any allegation as to how the Respondents had been "deliberately indifferent" to the Petitioners' Constitutional rights. For these reasons, the District Court determined that dismissal was appropriate.

The District Court also ruled that, assuming dismissal pursuant to Rule 12(b)(6) was not proper, summary judgment under Rule 56 was appropriate, given that Petitioners had failed to come forward with any evidence whatsoever that any of the actions alleged to have been taken by the officers in question were taken because of the existence of governmenal policy or custom.

Petitioners' defense to summary judgment was that they should be granted more time to discover the existence of such a policy. With regard to Lake Worth, Petitioners never initiated any discovery whatsoever, however, despite having over seven months to do so. Not surprisingly, the District Court was not persuaded by Peitioners' argument, ruling that Petitioners had been provided sufficient time for discovery, and that, in order to justify the initial filing of a their action, they should

have been able to identify some facts which would have warranted a conclusion that such a policy existed, since that is one of the predicates to stating a valid action under 42 U.S.C. § 1983.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on the grounds that Petitioners' complaint failed to allege any specific facts to support its claims that the Respondents had a policy of inadequate training, as required by the heightened pleading requirement adopted by the Fifth Circuit. It specifically did not address the remainder of the reasons for the District Court's dismissal.

Petitioners' First Amended Complaint alleged in relevant part:

> the search of the Leatherman's home was planned and carried out by law enforcement officers employed by or under the control of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth.

(Paragraph 17). Petitioners thereafter alleged that:

> the shooting of their family dogs on the occasion in question by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their effects against unreasonable seizure as protected by

the Fourth Amendment to the United States Constitution ***

(Paragraph 21), and that:

> the manner in which the search of their home was carried out by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth deprived them of their right to be secure in their house against unreasonable searches as protected by the Fourth Amendment to the United States Constitution.

(Paragraph 22). The Petitioners' complaint sets forth absolutely no factual allegations regarding Lake Worth's alleged participation in any actions which may have constituted an invasion of their constitutional rights. Based solely upon the above allegations, Petitioners thereafter asserted, again in conclusory allegations only, that:

> Defendant City of Lake Worth is liable to [the Leatherman plaintiffs] pursuant to 42 U.S.C. § 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of law; that Defendant City of Lake

> Worth failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violations alleged in paragraph 21.

(Paragraph 25) Petitioners further asserted that:

> Defendant City of Lake Worth is liable to Plaintiffs pursuant to 42 U.S.C. § 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of State law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which

> search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 22.

(Paragraph 28).

SUMMARY OF THE ARGUMENT

The petition of writ of certiorari should not be granted because the Petitioners' complaint failed to meet either the Fifth Circuit's heightened pleadings requirement for civil rights actions brought pursuant to 42 U.S.C. section 1983, or the constraints of Federal Rule of Civil Procedure 8(a).

Plaintiffs' complaint contained only a conclusory allegation that the actions complained of were taken pursuant to a custom or policy of Lake Worth. The existence of an unconstitutional municipal policy is a necessary element of a claim under 42 U.S.C. section 1983 brought against a municipality, and without showing the existence of such a policy, Petitioners' complaint against Lake Worth was properly dismissed under Federal Rule of Civil Procedure 12(b). Any other result would be inconsistent with a municipality's absolute immunity from suit, as well as liability, absent a showing of the existence of such a policy.

The Fifth Circuit's holding does not conflict with Federal Rule of Civil Procedure 8(a), because Rule 8(a) expressly provides that the plaintiff must include in the complaint a statement of the claim showing that the plaintiff is entitled to relief. Merely including

conclusory allegations tracking the elements of the cause of action does not show that a plaintiff is entitled to relief, and such conclusory allegations have consistently been held to be deficient under Rule 8 and subject to dismissal under Rule 12.

Lastly, the Fifth Circuit's holding does not violate the Rules Enabling Act, 28 U.S.C. section 2072, because the Fifth Circuit's holding in no way abridged Petitioners' substantive legal rights. Rather, it simply dictates the procedural requirements placed upon a plaintiff stating a cause of action under 42 U.S.C. section 1983.

ARGUMENT

Municipal liability under 42 U.S.C. section 1983 is limited to actions taken pursuant to municipal policy.

A municipality is liable under 42 U.S.C. section 1983 only when the municipality itself has violated a person's constitutional rights pursuant to an official policy statement, ordinance, regulation or decision. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Under *Monell*, recovery from a municipality is limited to acts "of the municipality." *Id.* at 694. A municipality may only be held liable for acts which it has officially sanctioned or ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Thus, a municipality may not be held liable under section 1983 unless Petitioners establish the existence of an unconstitutional municipal policy. *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988). Based upon these authorities, in order for Petitioners to state a claim against Lake Worth, they had to adequately plead the existence of a specific unconstitutional policy which was enacted or implemented by Lake Worth.

This Court has specifically noted that there are only "limited circumstances" in which an allegation of failure to train can be the basis for liability under section 1983.

City of Canton v. Harris, 109 S. Ct. 1197 (1989).

The necessary requisites to establish the existence of a policy of inadequate training, as is alleged in this case, were discussed in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, this Court specifically rejected the premise that municipal policy imputing liability could be inferred from a single isolated act by a police officer. In holding that an unjustified shooting by a police officer, without more, does not result from official policy, the *Tuttle* court noted that "***it is therefore difficult in one sense even to accept the submission that someone pursues a policy of inadequate training, unless evidence be adduced which proves that the inadequacies resulted from conscious choice — that is, proof that the policymakers deliberately chose a training program that would prove inadequate." 471 U.S. at 823. This rationale is obviously consistent with the holding in *Monell*, and has since consistently been upheld. *See, e.g.*, *Praprotnik*, 108 S. Ct. at 915; *Pembaur*, 475 U.S. at 469.

Moreover, this Court stated that inadequate police training "***may serve as a basis for Section 1983 liability only where the a failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact." *Harris*, 109 S.Ct. at 1204.

Petitioners' First Amended Complaint fails to show the existence of a municipal policy.

Petitioners' First Amended Complaint fails to show the existence of a policy which has been formally adopted by or officially sanctioned or ordered by any policymakers for the City of Lake Worth. Specifically, Petitioners pleaded that the search of the Leatherman residence was planned and carried out by law enforcement officers employed by or under the control of Respondents TCNICU, Tarrant County and City of Lake Worth. Nowhere in Petitioners' complaint is there any allegation of what specific actions were carried out by officers of Lake Worth. There are no allegations that Lake Worth's officers, as opposed to officers of TCNICU or Tarrant County, entered and searched the Leathermans' residence. There are no specific allegations that Lake Worth's officers shot the Leathermans' dogs during the search. There are simply no allegations of any specific involvement by Lake Worth in the Leatherman "incident", and no showing of the existence of any municipal policy of Lake Worth, other than Petitioners' conclusory statement that Lake

Worth failed to formulate and implement an adequate policy to train its officers. Neither can Petitioners rely upon the Andert incident to show the existence of such a policy. The complaint clearly acknowledges that no Lake Worth officers were present or participated in the search of the Andert residence.

The Fifth Circuit's application of a "heightened pleadings" requirement under Rule 8 is appropriate in cases such as the one at bar.

The Fifth Circuit analyzed these "bare bones" statements and determined that they were at best mere conclusory allegations which were not sufficient to sustain a section 1983 cause of action against Lake Worth. In so doing, the Fifth Circuit specifically applied a heightened pleading standard to the bare bones allegations in Petitioners' complaint. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992) (citing *Palmer v. City of San Antonio*, 910 F.2d 514 (5th Cir. 1987)). Under Fifth Circuit authority, a complaint against a municipality must specifically identify: (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a Constitutional right. *Palmer*, 910 F.2d at 516. Under *Palmer*, even assuming arguendo that Petitioners' allegations

were sufficient to allege action by the police officers of Lake Worth, the Fifth Circuit held that where a lawsuit brought against a municipality is predicated on inadequate training of its police officers, there has to be shown at least a pattern of similar incidents in which citizens were injured in order to establish the official policy requisite to municipal liability under section 1983. *Id.* at 518. Since Petitioners did not allege that Lake Worth police officers were involved in the Andert incident, which was obviously added to the complaint in an attempt to meet this requirement, and since there was no other showing made of the existence of a policy, the minimum requirements for stating a claim clearly were not met. Petitioners' argument that the Fifth Circuit's heightened pleading requirement violates Rule 8 has no merit. The Fifth Circuit rule is consistent with precedents set by almost all other Circuit Courts of Appeal. Whether they have articulated the rule as a "heightened pleading" standard, or simply as application of the requirements of Rule 8, most of the Circuits have applied a similar requirement in civil rights cases. *See e.g., Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed*, 111 S. Ct. 1789 (1991) (adopting heightened

pleading requirement); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaints must do more than state simple conclusions); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2nd Cir. 1977) (complaints containing only conclusory, vague or general allegations are insufficient) *Hall v. Pennsylvania State Police*, 570 F.2d 86, 89 (3rd Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990) (adopting heightened pleading requirement); *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) (adopting heightened pleading requirement); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989) (adopting heightened pleading requirement); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) (mere conclusory allegations are insufficient to state claim); *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989) (adopting heightened pleading requirement); *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (complaint must contain specific factual allegations to support claim of conspiracy); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988) (adopting heightened pleading requirement); *Arnold v. Board of Education*, 880 F.2d

305 (11th Cir.1989) (Rule 8 is applied more rigidly to claims alleging official policy or custom of a local government).

The Fifth Circuit's pleading requirements are also consistent with this Court's holdings. For example, the heightened pleadings requirement has also been applied to section 1983 qualified immunity defenses pursuant to this Court's rulings in *Harlow v. Fitzgerald*, 457 U.S. 800 (1987) and *Anderson v. Creighton*, 483 U.S. 635 (1987), recognizing the applicability of "objective" immunity tests in order to protect governmental officials from the burdens of trial and litigation. *Harlow* and its progeny clearly recognize that significant policy considerations exist for not subjecting government officials entitled to qualified immunity to the costs, burdens and fears of being sued. In other words, this Court has emphasized that good faith immunity embraces not only a defense to personal liability, but also an "immunity from suit." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Just as *Harlow* and *Mitchell v. Forsyth* recognized that mere allegations of wrongdoing would not defeat a claim of good faith immunity, so too did *Monell* recognize that "a local government *may not be sued* under section 1983 unless the unconstitutional

deprivation can be attributed to municipal policy. 432 U.S. at 694 (emphasis supplied). This is only logical. The justifications for protecting individual officers entitled to qualified immunity from costs and burdens of frivolous lawsuits are equally applicable to governmental entities entitled to absolute immunity. The heightened pleading requirement adopted by the Fifth Circuit simply enforces these same policy considerations by preventing meritless lawsuits in cases brought against governmental entities entitled to absolute immunity from suit. Just as in cases of qualified immunity, where a mere conclusory allegation of bad faith is not sufficient to defeat a government official's qualified immunity, a complaint against a governmental entity must meet a similar threshold, in order to state a claim under section 1983, specifically the existence of a municipal policy. To adopt any other rule would eviscerate the immunity from suit that governmental entities have under the law, because a plaintiff could simply file a complaint alleging the existence of a policy, without any actual information regarding the existence of such a policy, in the blind hope of discovering through his suit some evidence upon which to base his claim. Such a result is

inconsistent with the grant of immunity. It is also inconsistent with this Court's previous statement that a claim against a municipality is not established "by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible." *Harris*, 109 S. Ct. at 1205.

Application of the "heightened pleadings" requirement is not necessary to sustain dismissal of Petitioners' claim against Lake Worth.

Even assuming, however, that application of a "heightened pleading" requirement is not warranted, dismissal was still appropriate. It is true that Rule 8 generally allows "notice pleadings", but what constitutes "notice" is a flexible concept, and has been kept so to ensure that pleadings requirements can be construed to do "substantial justice". Whatever "notice pleadings" are, however, it is at least clear that Rule 8 entitles a defendant to be accorded fair notice of the basis for the claim against it. Given that municipalities are accorded absolute immunity unless the existence of a policy or custom is shown, and given that this principle affords municipalities immunity from suit as well as from liability, a plaintiff should be required to show by its pleadings that it has a claim which, if proven, would

support a judgment against the defendant.

Whether the term "heightened pleading" standard is used is not controlling. In numerous cases applying Rule 8, courts have required the plaintiffs to plead the factual basis for their claims. In some cases, such as the one at bar, they have articulated a "heightened pleading" standard. Similarly, the Fifth Circuit has required specific factual allegations be contained in any complaint asserting a cause of action under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. section 1962. In so ruling, the Fifth Circuit determined that the order was entirely consistent with what the requirements of Rule 8 that pleadings contain a plain statement of the claim and pleadings be direct and concise. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). In other cases, courts have reached similar results based solely upon the dictates of Rule 8, without reference to any "heightened pleadings" standard.

For example, the Sixth Circuit affirmed dismissal of a cause of action brought pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. sections 6972 and 6973, and the Comprehensive Environmental Response Compensation and Liability

Act ("CERCLA"), 42 U.S.C. sections 9606 and 9607(a). In so holding, the Court noted that the plaintiff had alleged that they had incurred certain "response costs", a necessary predicate to an action under CERCLA. The Sixth Circuit rejected the plaintiff's argument that this was a sufficient pleading under Rule 8(a), however, noting that Rule 8(a) at least requires that the plaintiff include a short and plain statement of the claim showing that the pleader is entitled to relief, and this requires that the plaintiff give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The court noted that implicit in this requirement is a statement of the circumstances, occurrences and events upon which the claim is based. *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42 (6th Circuit 1988) (per curium). The Court pointed out that the plaintiff's complaint failed to alleged any factual basis for the conclusory allegation that they had incurred response costs, and accordingly affirmed the dismissal. *Id.*

The Seventh Circuit reached a similar conclusion, and affirmed Rule 12(b) dismissals in the face of similar conclusory allegations, noting that under Rule 8, while well pleaded factual allegations are to be taken as

admitted for Rule 12(b) purposes, mere unsupported conclusions are not, and such are insufficient to avoid dismissal. *See, e.g. Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194, 1198 (7th Cir. 1977) *cert denied*, 435 U.S. 905 (1978); and *Challenger v. Local Union No. 1 of Intern. Bridge, Structural, and Ornamental Iron Workers, AFL-CIO*, 619 F.2d 645, 648-49 (7th Cir. 1980). In *Challenger* the Court determined that allegations that the defendants had breached their fiduciary duties, which allegation was being used to support a cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381, was insufficient to withstand a motion to dismiss. The court noted that the bald conclusion that the defendants had breached their fiduciary duty was insufficient, because a motion to dismiss admits allegations of fact, but not legal conclusions. *Id.* at 649.

The Ninth Circuit also adopted a similar position regarding the proper construction of Rule 8. For example, in a case wherein the plaintiffs sought a declaratory judgment rendering the Federal Land Policy and Management Act of 1976, 43 U.S.C. sections 1701-1782, unconstitutional, the court affirmed dismissal under Rule 12(b)(6), also stating that the court will not

presume the truth of a legal conclusion in the complaint, and that the plaintiff is required to plead factual allegations in support of their claim. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

The Tenth Circuit has construed Rule 8 in the same fashion, noting that on a motion to dismiss, facts that are well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged to support them. *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977); *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976).

In none of these cases did the courts' holdings turn on application of a "heightened pleading" requirement. Instead, the courts were guided by the language of Rule 8 itself, which imposes a duty on the plaintiff to at least provide the defendant with a short and plain statement of the claim *showing* that the pleader is entitled to relief. Petitioners' pleadings in this case did not show that they were entitled to relief. Instead, Petitioners did nothing more than track verbatim the language of this Court as to what the prerequisite for stating a case under section 1983 required. Moreover, as previously

pointed out, they also failed to allege any series of incidents involving Lake Worth which could arguably have supported an inference of the existence of a municipal policy. Thus, they accorded Lake Worth absolutely no notice as to the nature of the claim whatsoever, and failed to comply with the minimum dictates of Rule 8.

The interpretation of Rule 8 proposed by Petitioners would allow the filing of purely frivolous claims and permit prospective litigants to troll the waters of the courthouse, casting their nets indiscriminately in the blind hope of "catching a big one." Unfortunately, such a rule would also result in the inconveniencing of numerous parties against whom the plaintiff has no colorable claim, who then are put to the expense of needlessly defending a case and responding to discovery while the plaintiff determines whether they have a case or not. Such a rule certainly would not do substantial justice.

Petitioners' response to this argument has been that requiring a plaintiff to plead more than conclusory allegations will prevent some plaintiffs from discovering whether they have a claim, and so result in the denial of some meritorious claims. This argument is not

terribly compelling, given that the natural corollary to Petitioners' argument is that some innocent parties will also be dragged into court and subjected to the needless expense, inconvenience and embarrassment of defending patently meritless claims. Moreover, Petitioners' premise is faulty. Rule 8, as interpreted by these Courts, does not prejudice persons with meritorious claims. No court, and certainly not the Fifth Circuit, has held that a plaintiff must plead all evidentiary facts which support their claim. Rather, all that is required is that the plaintiff plead enough to establish that it has a colorable claim. It is not a great burden to place upon plaintiffs that they be able to state some real basis for believing that they have a legally cognizable injury for which the defendant may be liable.

The holding of the Fifth Circuit does not violate the Rules Enabling Act.

Petitioners' argument that the Fifth Circuit's holding violates the Rules Enabling Act is based upon their conclusion that some meritorious claims will be affected. Petitioners cite no evidence or authority in support of their assertion that some meritorious claims will be affected, but even were that true, their argument is specious. The Act provides that the Federal Rules shall

not "abridge, enlarge or modify any substantive right". Requiring the plaintiffs to show in their complaint that they have a claim does not abridge, enlarge or modify their substantive legal rights. Petitioners' substantive rights were that they were entitled to file a complaint and pursue a claim for relief, presuming that their civil rights had been violated and the other prerequisites of a claim met. Once that complaint is filed, however, rules of procedure govern how the complaint will be adjudicated.

If one were to adopt Petitioners' construction of the Rules Enabling Act, virtually every rule of procedure would be equally invalid. Several rules, including Rules 11, 41 or 56 could be used to defeat their claim. All of the other rules, when applied, will affect their claim. None of them diminish or modify their substantive rights, however, and Petitioners have not articulated any such modification.

Indeed, one might well argue that not only does the standard applied by the Fifth Circuit not violate the Rules Enabling Act, any other interpretation of Rule 8 would actually violate the Act. As previously stated, the absolute immunity that Lake Worth asserts affords the city not only immunity from liability, but also immunity

from suit, which can only be overcome if an unconstitutional municipal policy is involved. To force Lake Worth to litigate a claim before the existence of any municipal policy is shown by Petitioners abridges Lake Worth's substantive legal rights, specifically, immunity from suit. *See e.g., Elliott v. Perez*, 751 F.2d at 1479; *Morrison v. City of Baton Rouge*, 761 F.2d 242, 243-44 (5th Cir. 1985) (discussing impact of liberal Rule 8 interpretation on substantive qualified immunity law).

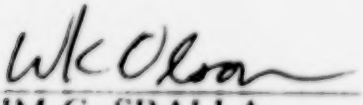
Even if the Fifth Circuit erred in dismissing Petitioners' complaint, summary judgment for all defendants was still warranted.

Even assuming for purposes of argument that the dismissal was inappropriate, the order of the District Court is equally sustainable based upon the alternative relief granted of summary judgment. Petitioners offered no evidence in response to the motion for summary judgment that the actions complained of were taken pursuant to any municipal policy or custom. Petitioners had ample time to discover and come forward with such evidence, as determined by the District Court. Hence, the Petitioners' complaint was properly dismissed in any event, and further review of the grounds for dismissal is not warranted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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